BEFORE THE STATE BOARD OF E QUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LEO S. BING)

Appearances:

For Appellant: Frank M. Keesling and Adrian A. Kragen, Attorneys at Law

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner; James J. Arditto, Franchise Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code (formerly Section 20 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in denying the claim of Leo S. Bing for a refund of personal income tax in the amount of $5,875.37 for the year ended October 31, 1941, plus interest thereon to October 15, 1944, in the sum of $940.06.

The claim relates to an alleged overpayment resulting (1) partly from the inclusion in Appellant's personal income of the income from a trust established by him on December 24, 1934, for the benefit of his son, Peter Stephen Bing, then four months old, and any children thereafter born, and (2) partly from a reduction in a Claimed deduction for depreciation on some business property located in Los Angeles. Inasmuch, however, as it was subsequently agreed by the Appellant and the Commissioner that depreciation on the property should be computed on the basis of a thirty-year remaining life, consideration of this matter is unnecessary.

Appellant, his wife and brother were named as the trustees of the trust, and as such they were empowered to apply towards the support, maintenance and welfare of the beneficiary ('using this term both plurally and in the singular) so much of the trust net income or corpus as they, in their sole discretion might deem necessary or advisable for such purpose, after taking into account his ability to support himself and any other source of support available to him. Any net income in excess of any amount so applied was to be paid over annually to the beneficiary, unless the latter was a minor, in which event the excess was to be accumulated for the beneficiary and turned over to him when he reached the age of majority. Nevertheless, the trustees were authorized "in their discretion at any time to apply to the support, maintenance and welfare of any such minor issue the income accumulated for him or her or any part thereof."

Approximately 9½ years after the execution of the trust instrument, an action was filed by Appellant in a Nevada court against himself and his wife as trustees (Appellant's brother having previously resigned), against his son, Peter Stephen Bing, and against his wife as guardian of the son to secure a reformation of the instrument to the extent of eliminating therefrom the language authorizing the application of income for the beneficiary's support during his minority and substituting therefor a positive prohibition against tiny such use of the incoms prior to majority. Appellant alleged that this was his intent from the inception of the trust and that in accordance therewith no part of the trust income had ever been distributed for the beneficiary% support. After trial, a Judgment and Decree was issued on May 6, 1944, in accordance with Appellant's prayer and pursuant to Findings of Fact and Conclusions of Law wherein the Court found that all parties concerned were residents of Mevada, that the trust principal was located in Nevada, and that it was never Appellant's intention that any part of the trust income be used for the beneficiary's support during his minority,

Appellant does not deny that the trust income for the year ended October 31, 1941, was taxable to him under Section 12(h) of the Personal Income Tax Act (now Section 18172 of the Revenue and Taxation Code) in view of the decisions in Helvering v. Stuart, 317 U.S. 154, and Borroughs v. McColgan, 21 Cal. 2d 481, if the trustees might then have used such income for the beneficiary's support. He argues, however, that the situation was otherwise, that the judgment of the Nevada Court reforming the trust instrument established this as a fact, and that such judgment is entitled to full faith and credit in California and, accordingly, is binding upon this Board. He contends further that the judgment "is a determination of the nature of the trust instrument from the beginning" and of his original intent regarding it.

It must be conceded that the Nevada judgment is entitled to full faith and credit in California by virtue of Article IV, Section 1 of the United States constitution. Certainly recognition must be given it in any suit here between the parties or their privies, and perhaps in controversies between other private litigants. We believe, however, that in so far as this State is concerned, there are other considerations which support a conclusion that the judgmentcannot bina the Stat:: in any inquiry by it as to whether Appellant is liable for any tax under the Personal Income Tax Law.

In the first place, a judgment of one State has no greater effect in ths courts of another State than in its own courts. Tilt v. Kilsey, 207 U.S. 43, 55.We find it difficult accordingly, to see how the Nevada judgment can have any effect even in Nevada as to the State of California, since not only was the latter not a party to the Nevada proceeding, but it was impossible under the Eleventh Amendment of the United States Constitution for Appellant to have made it such.

Furthermore, a judgment of a sister State will, pursuant

to the full faith and credit clause, be given only the same weight and condiseration as though rendered by a court of this State. Barnaby v. Barnaby, 100 Cal. App. 195; McCormack v. McCormack, 175 Cal. 292. Hence, the question arises as to what the effect would have been had the Nevada judgment been issued by a California court. It would, of course, have been binding upon the parties and their privies. But we doubt that it could have bound the State of California with respect to any determination by it of the impact of the Personal Income Tax Act. See Estate of Bloom, 213 Cal. 575; Estate of Holt, 61 Cal. App. 4.64.

So far as the effect of the reformation itself is concerned, the authorities, in our opinion, require the acceptance of the Commissioner's position. Sinopoulo v. Jones, 154 Fed. 2d 648, involved a trust instrument executed in 1939 and reformed in 1941 by the judgment of a State court in a proceeding to which the Federal Government was not a party through the addition of an irrevocability clause and other provisions, the reformation being made expressly retroactive to the date of execution. The judgment was thereafter introduced in evidence by the trustor in a Federal income tax proceeding in an effort on the part of the trustor to establish that the trust income was not taxable to him for the years 1939, 1940 and 1941. Holding otherwise, the Court of Appeals stated

> "...Appellant's tax liability for the three years in questior; is to be determined from the pfovisions which he included in the declaration of trust which he executed, and not from what he intended to include therein." 154 Fed. 2d at 650.

Eisecberg v. Commissioner, 5 T.C. 856, affirmed 161 Fed. 2d 506, similarly presented the questior: of the applicability of the Federal law to some trust instruments dated January 2, 1940, each at that time containing a provision that the trustee could exercise his discretion as to distributing income or principal until the beneficiary reached the age of 40, but reformed by a state court on May 19, 1943, as of January 2, 1940, by, among other things, including a provision eliminating the trustee's power to distribute income or principal to or for the beneficiary during the latter's minority. The Court of Appeals upheld a determination of the Tax Court taxing the trust income to the trustor for the years 1940 and 194.1 on the basis of Helvering v. Clifford, 309 U.S. 331, in the course of its opinion noting that the Tax Court considered the trusts as they were originally written and that that Court was "of the opinion that the reformation could not affect the tax years involved, despite the retroactive effect of the State Court's order. .." 161 Fed. 2d at 510.

Again, in Erik Krag, 8 T. C. 1091, a case strikingly similar to Sinopoulo v. Jones, supra, the Tax Court passed on the effect of a State court's reformation of a trust instrument by the incorporation 0f an irrevocability clause, the Court holding that the reformation was not retroactive, and that, consequently,

the trust income accruing prior to the date of reformation was taxable to the trustor under Section 166 of the Internal Revenue Code. See also Robert L. Daine, 9 T.C. 47.

With regard to such cases as Blair v. Commissioner, 300 U.S. 5, and Freuler v. Helvering, 291 U.S. 35, relied upon by Appellant, it suffices to say that they are distinguishable from those discussed above in that, as stated in Eisenberg v. Commissioner, supra at 5 T.C. 868, in Robert S. Daine, supra at page 51, and Erik Krag, supra at page 1097, they dealt only with property rights between individuals. Furthermore, unlike the situation in the Eisenberg, Jones and Krag cases in particular they in most instances involved instruments whose meaning was so uncertain as to require the determination of a State court as to their legal effect.' The facts here, on the other hand, present a picture more nearly parallel to those in the Eisenberg, Jones and Krag cases, since there evidently is nothing in the trust instrument originally executed by Appellant as to the use of trust income which might be construed as ambiguous. Therefore, that which Appellant incorporated in the instrument at that time and not what he intended to include therein is determinative of his tax liability between the date of the original execution of the instrument and the date of reformation by the Nevada Court. Sinopoulo v. Jones, supra; Gaylord v. Commissioner, 153 Fed. 2d 408. And since the intent then expressed clearly permitted Appellant to use the trust income for the support of his minor child, the trust income 'for the period prior to reformation must be deemed taxable to Appellant in view of the rule of the Stuart and Borroughs cases,

O R D E R

Pursuant to the views of tile Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in denying the claim of Leo S. Bing for a refund of personal income tax in the amount of $5,875.37 for the year ended October 31, 1941, plus interest thereon to October 15, 1944, in the sum of $940.06, be and the same is hereby modified; in computing the liability of said Leo S. Bing for said year the Commissioner is hereby directed to compute the depreciation on the property in question on the basis of a thirty-year remaining life and to refund to said Leo S. Bing such amount of tax, plus interest thereon, as said computation may establish to have been overpaid for said year; in all other respects the action of the Commissioner is hereby sustained.

Done at Sacramento, California, this 5th day of January, 1949, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J.H. Quinn, Member
J. L. Seawell, Member
Geo. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary